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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased,
Petitioner,
vs.
SOUTHERN RAILWAY COMPANY, a Corporation,
Respondent.

No. 161

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit,

and

BRIEF IN SUPPORT THEREOF.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals rendered and entered on the 14th day of April, 1941, in this case, lately pending in said United States Circuit Court of Appeals for the Eighth Circuit, styled Southern Railway Company, a corporation, appellant, v. Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, appellee, being cause No. 11,609 of civil causes on the docket of said United

States Circuit Court of Appeals for the Eighth Circuit, reversing a judgment of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, in said cause, in favor of your petitioner and against respondent herein.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in said cause of Southern Railway Company, a corporation, appellant, v. Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, appellee, which petitioner here seeks to have reviewed, appears on pages 436 to 444, inclusive, of the printed transcript of the record filed herewith and is reported in 119 Fed. (2) at page 85. A former opinion of said United States Circuit Court of Appeals for the Eighth Circuit in said cause, which was thereafter vacated and set aside, appears on pages 402 to 411, inclusive, of the printed transcript of the record filed herein and is reported in 115 Fed. (2) at page 317.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by Mary Stewart, administratrix of the estate of John R. Stewart, deceased, on April 20, 1937, in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri against respondent under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), to recover for the alleged wrongful death of said deceased, resulting from injuries sustained by him while in the employ of respondent as a brakeman and alleged to have been proximately caused by the violation by respondent of Section 2 of the Federal Safety Appliance Act (45 U. S. C. A., Sec. 2, Act of March 2, 1893,

c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2. 1903, 32 Stat. 943, c. 976) in failing to have its cars, moving in interstate commerce, equipped with couplers coupling automatically by impact without the necessity of men going between the ends of the cars.

As appears from the evidence and proceedings at the trial of said cause in said District Court, before the Court and a jury, John R. Stewart was injured on February 12, 1937 (R. 26), and died on February 14, 1937, as the result of such injuries (R. 56). When injured he was a member of respondent's switching crew engaged in coupling certain freight cars on track No. 12 in the "Kotman Yard" in East St. Louis, Illinois (R. 26, 27). Respondent is, and at the time of Stewart's injury was, a common carrier by railroad engaged in interstate commerce, and Stewart, at the time of his injury, was employed by respondent in such commerce (R. 50, 52, 53, 70, 71). Track No. 12 in said yard extended east and west and was a straight track (R. 27, 28). Seventeen cars had been placed on this track to be coupled together (R. 70, 71, 27). The engine was headed west, with all of the cars east of the engine (R. 28). Prior to Stewart's injury seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine (R. 27). A car is about 40 feet long (R. 44). The switchmen worked on the north side of this track, the engineer's side. Stewart, a switchman of twenty years experience (R. 59), received his fatal injuries when he went between the ends of two of the cars to effect a coupling between them by hand, that is, when he went between the last or easternmost car of the seven or eight cars that had been coupled together and were attached to the engine and the car immediately east thereof, referred to as the "east car," to open by hand the knuckle of the coupler of said east car (R. 29, 45).

Martin, respondent's engineer in charge of this switch engine, called as a witness for the plaintiff at the trial in

said District Court, testified that Stewart had been coupling these cars, working on the north side of track No. 12, and on this occasion walked back and gave Martin a back-up signal; that he (Martin) backed up his engine until he received a stop signal from Stewart, whereupon he stopped, set his brake and remained stationary; that Stewart then went between the cars, and a little later he heard Stewart holler, and then received a "slack ahead" signal from the foreman, Stogner, that is, a signal to move west, which he did (R. 44, 45). When asked if he paid any attention to whether or not Stewart used the pinlifter before he went in there, he said he did not notice him; that as an engineer what he did all the time was to look out for signals (R. 46).

Stogner, the foreman of respondent's switching crew, who had been in respondent's employ as a switchman for more than sixteen years (R. 26) called as a witness for the plaintiff, testified that the casualty occurred about 5:40 p. m., and that it was about dusk (R. 27); that he was eighty or ninety feet east of Stewart when the latter was injured, Stewart being between him and the engine (R. 28). He heard Stewart "holler," ran to him and found him with his arm caught between the couplers of the two cars. He said the knuckles on the couplers of both the cars were closed (R. 29). He testified that the pinlifter is used to open the knuckle; that cars cannot be coupled if both knuckles are closed, but can be coupled if both knuckles are open or if only one knuckle is open; that this is done by the switchman on the outside of the car with the pinlifter; that you get the lever and jerk the lifter and it kicks open (R. 31), but if you are unable to get it open with a pinlifter you go between the cars and open the knuckle by hand; that the pinlifter is operated with the left hand, because you have to face the car to do your work (R. 33). He testified that after Stewart's

injury he coupled together the two cars between which Stewart was injured, and that to do so he went between them and opened the knuckle by hand (R. 34). He said that if the pinlifter is working automatically it is not necessary to go in between the cars to open the knuckle by hand (R. 34). He further testified that the pinlifter on the east car was on the north side of the car, at the northwest corner thereof (R. 39) and was the only pinlifter on the north side; the pinlifter on the west car being on the south side (R. 37, 43); that they were working on the north side, and to make the coupling the man would stand on that side and work the lever of the pinlifter of the east car to open the knuckle (R. 39); that he would not have to go inside if it worked right; that the only thing that would require him to go in there is that it would not work right (R. 40). He said he did not know whether Stewart tried to use the pinlifter, as he was not watching Stewart (R. 43). He further testified that immediately preceding Stewart's injury he heard some cars hit right at him; that the noise came from the east end of the train (R. 50). On cross-examination Stogner was asked by respondent's counsel which pinlifter he tried to use, and he said he tried to use the pinlifter on the north side, the pinlifter on the east of the opening (R. 36).

At said trial respondent, defendant in said cause, introduced no evidence as to whether the pinlifter on said "east car" was in operative, working condition so as to enable a switchman, by use thereof, to open the knuckle of the coupler of that car without the necessity of going between the ends of the cars.

The trial of said cause in said District Court resulted in a verdict and judgment, on June 13, 1939, in favor of the plaintiff and against respondent in the sum of $17,500.00 (R. 345, 346). Thereafter respondent, in due course, appealed said cause to the United States Circuit Court of

Appeals for the Eighth Circuit, where said appeal was duly perfected and said cause was, on March 15, 1940, argued and submitted by counsel (R. 401). Thereafter Mary Stewart died, and on July 24, 1940, said Court of Appeals duly made and entered an order substituting Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, as appellee in said cause (R. 401).

Thereafter, on November 1, 1940, said Court of Appeals, in an opinion filed in said cause on said day, ruled that the evidence adduced at said trial sufficed to warrant the submission of the case to the jury, and that respondent's motions for a directed verdict and for a verdict *non obstante veredicto* were properly overruled, but held that said District Court erred in charging the jury (R. 402). And on said November 1, 1940, said Circuit Court of Appeals duly entered judgment in said cause in accordance with said opinion, reversing the judgment therein and remanding the cause to the District Court for a new trial (R. 412).

Thereafter, on November 15, 1940, within the time allowed by the rules of said Court of Appeals, petitioner and respondent each filed a petition for a rehearing of said cause in said Court of Appeals (R. 413, 423), and thereafter, on December 7, 1940, said Court of Appeals, by an order made and entered of record, sustained both of said petitions for a rehearing, and vacated, set aside and held for naught said judgment entered in said cause on November 1, 1940 (R. 435).

Thereafter, on March 10, 1941, said cause was again argued by counsel before said Court of Appeals and duly submitted to said Court (R. 435). Thereafter, on April 14, 1941, said Court of Appeals, in an opinion filed in said cause on said day, the opinion which petitioner here seeks to have reviewed (R. 436), ruled, in substance, that it was the duty of the deceased to use the pin lifter for opening

the knuckle of the east car; that there was no evidence that he did so; that the burden was upon the plaintiff to so show, and that because of the lack of direct proof that the deceased tried to use pin lifter before going between the cars no recovery could be had; that there was no substantial evidence tending to show that the pin lifter was defective, inefficient or inoperative; that there was no evidence to warrant a finding that the injury and death of the deceased proximately resulted from any failure on the part of respondent to equip its cars with couplers that would couple automatically by impact without the necessity of men going between the ends of the cars, and that the verdict was not sustained by substantial evidence, but rested upon conjecture and surmise (R. 436-444).

And said Court of Appeals, by its said opinion in said cause filed on April 14, 1941, ordered that the judgment appealed from be reversed and the cause remanded with directions to said District Court to grant respondent's motion for judgment in its favor notwithstanding the verdict. And on the same day judgment was entered in said cause by said Court of Appeals in accordance with said opinion (R. 444).

Thereafter, on the 29th day of April, 1941, and within the time allowed by the rules of said Court of Appeals, petitioner duly filed in said cause in said Court of Appeals his petition for a rehearing of said cause (R. 445).

And thereafter, on May 7, 1941, petitioner's said last-mentioned petition for a rehearing was by said Court of Appeals overruled (R. 469), on which day the judgment of said Court of Appeals in said cause became final.

The duly certified record, including all of the proceedings in said cause in said United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and in said United States Circuit Court of Appeals for the Eighth Circuit, is filed herewith under separate cover.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Courts of Appeals. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on April 14, 1941 (R. 444). A petition for a rehearing was duly filed by this petitioner, appellee in said Circuit Court of Appeals, on April 29, 1941, within the time provided by the rules of said Circuit Court of Appeals (R. 445), and said petition for a rehearing was denied by said Circuit Court of Appeals on May 7, 1941 (R. 469).

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for writ of certiorari are:

(1) Whether, in an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), for the death of a switchman employed in interstate commerce, resulting from injuries sustained by him while between two freight cars trying to open the knuckle of the coupler of one of them by hand in order to prepare the coupler for coupling by impact, it being charged that such injuries were proximately caused by the failure of his employer, an interstate carrier by railroad, to equip its cars with couplers coupling automatically by impact, without the necessity of men going between the cars, as required by Section 2 of the Safety Appliance Act (45 U. S. C. A., Sec. 2, Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, c. 976), the plaintiff, in order to make a case for the jury, must adduce the testimony of

an eyewitness to the casualty affirmatively showing that the deceased employee tried to open the knuckle by operating the lever of the pinlifter at the side of the car before going between the cars to open the same by hand, though evidence be adduced to support a finding that the pinlifter was not in efficient working order.

(2) Whether, in an action for the death of a switchman resulting from injuries sustained by him in a switching operation while between cars trying to open a knuckle by hand, alleged to have been proximately caused by the failure of the defendant railroad company to equip its cars with couplers coupling automatically by impact without the necessity of men going between the cars, as required by Section 2 of the Safety Appliance Act, it will be presumed, in the absence of evidence to the contrary, that the deceased employee did not subject himself to the risk of injury by going between the cars to open the knuckle by hand without first having tried to use the pinlifter for that purpose.

(3) Whether, in an action upon the Federal Employers' Liability Act for the death of a switchman, resulting from injuries sustained by him in a coupling operation and alleged to have been proximately caused by the failure of the defendant railroad company to equip its cars with couplers coupling automatically by impact without the necessity of men going between the ends of the cars, undisputed testimony adduced by the plaintiff that the deceased went between two freight cars for the purpose of effecting a coupling between them and sustained fatal injuries while trying to open the knuckle of a coupler by hand, and undisputed testimony of the foreman of the crew that shortly after the casualty he coupled these cars together, and that to do so he went between them and opened the knuckle by hand, that it is not necessary to go between cars to open a knuckle by hand if the pin lifter is working, and that he

tried to use the pin lifter, sufficed to support a finding by a jury that said pin lifter was defective or inefficient and not in compliance with the automatic coupler provision of the Safety Appliance Act.

(4) Whether, under the undisputed evidence in this case, as shown by petitioner's summary statement of the matter involved, supra, the jury was warranted in finding, as it did, that the injury and death of plaintiff's intestate, John R. Stewart, was proximately caused by the failure of respondent to have and keep its cars equipped with couplers coupling automatically by impact without the necessity of men going between the ends of the cars as required by Section 2 of the Safety Appliance Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In this case the United States Circuit Court of Appeals for the Eighth Circuit, by its last opinion herein, rendered on April 14, 1941, decided an important question of federal law which has not been, but should be, settled by this Court, namely: In an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), for the death of an employee employed in interstate commerce, resulting from injuries sustained by him in a coupling operation while between freight cars trying to open the knuckle of the coupler of one of them by hand, alleged to have been proximately caused by the failure of his employer, an interstate carrier by railroad, to equip its cars with couplers coupling automatically by impact without the necessity of men going between the cars as required by Section 2 of the Safety Appliance Act (45 U. S. C. A., Sec. 2, Act of March 2, 1893, c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, c. 976), wherein evidence is adduced supporting a finding that the pin lifter, designed to enable an

employe to open the knuckle without the necessity of going between the cars, was, in fact, not in efficient working condition, making it necessary to go between the cars to open the knuckle by hand, must the plaintiff, in order to make a case for the jury, adduce the testimony of an eyewitness to the casualty affirmatively showing that the deceased tried to use the pin lifter before going between the cars to open the knuckle by hand? In the instant case said Court of Appeals held that it was the duty of Stewart, the deceased employee, to try to use the pin lifter before going between the cars, and that the burden was upon the plaintiff to show that he did so, and held, in substance, that, regardless of what might otherwise be the nature or character of the evidence, the plaintiff could not recover because of the failure to adduce direct proof that the deceased performed such duty. The question so decided is an important one of federal law which has not been expressly decided by this Court, and which, petitioner believes, should be decided by this Court.

(2) There being no evidence lawfully tending to show that the deceased did not try to use the pinlifter before going between the cars to open the knuckle by hand, the ruling of the Court of Appeals in this case, denying a recovery upon the ground that it was not affirmatively shown that the deceased performed the duty said to have rested upon him to try to use the pinlifter before going between the cars, is contrary to the principle firmly established by this Court that, in the absence of evidence to the contrary, a deceased will be presumed to have performed whatever duty may have rested upon him under the circumstances attending his death.

(3) In this case petitioner adduced undisputed testimony that the deceased, Stewart, went between the cars for the purpose of effecting a coupling between them and sustained his fatal injuries while trying to open the

knuckle of the coupler of the "east car" by hand, and the undisputed testimony of respondent's foreman, Stogner, that shortly after Stewart's fatal injury he coupled together the cars that Stewart was attempting to couple when injured and that to do so he also went between the cars and opened said knuckle by hand, that it is not necessary to go between cars to open a knuckle by hand if the pinlifter is working, and that he tried to use the pinlifter. Respondent offered no evidence as to the condition of the pinlifter. Nevertheless, said Court of Appeals ruled that the finding of the jury that the pinlifter was not in efficient working order was not supported by substantial evidence. In so ruling the Court of Appeals usurped the function of the jury, and its said ruling is in conflict with many decisions of this Honorable Court and of the Court of Appeals in other circuits holding that, on the question whether a case is one for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one of fact for the jury.

(4) The testimony of the foreman, Stogner, shows that shortly after the casualty, in undertaking to couple these cars, he tried to use this very pinlifter but found that it would not function, and that to effect a coupling he had to go and did go between the cars to open the knuckle by hand—the very evil against which the automatic coupler provision of the Safety Appliance Act is directed. And the ruling of said Court of Appeals that such testimony constituted no substantial evidence of the failure of

respondent to equip its cars with couplers coupling automatically by impact without the necessity of men going between the ends of the cars is in conflict with the decisions of this Court and of the courts of appeals in other circuits holding that the test of the observance of the duty placed upon a carrier by the automatic coupler provision of the Safety Appliance Act is the performance of the appliance; that proof of the failure of a coupling appliance to function efficiently at any time, so as to enable a coupling to be effected without the necessity of going between the ends of the cars, warrants a finding that such appliance was defective or inefficient and not in compliance with the act.

(5) The decision of said Court of Appeals in this case, by its said last opinion herein, that, as a matter of law, the evidence failed to show that the injury and death of the deceased proximately resulted from the violation by respondent of said automatic coupler provision of Section 2 of the Safety Appliance Act is not in accord with the applicable decisions of this Court holding that the true rule is that what is the proximate cause of an injury is ordinarily a question for the jury to be determined as a fact in view of the circumstances attending it and that it is only where, under the evidence, reasonable minds could draw but one conclusion, that the question of proximate cause becomes one of law.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit to the end that the judgment of said Court of Appeals in said cause of Southern Railway Company, a corporation, Appellant, v. Clarence A. Stewart, Administrator of the Estate of John

R. Stewart, Deceased, Appellee, No. 11,609, be reviewed by this Court, as provided by law, and that upon such review the judgment of said Court of Appeals in said cause, of date April 14, 1941, be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

CHARLES M. HAY,

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CHARLES P. NOELL,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The last opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the cause of Southern Railway Company, a corporation, appellant, v. Clarence A. Stewart, administrator of the estate of John R. Stewart, deceased, appellee, filed on April 14, 1941, appears on pages 436 to 444 of the printed transcript of the record filed herewith, and is reported in 119 Fed. (2), at page 85. A former opinion of said Court of Appeals in said cause rendered on November 1, 1940, which was thereafter vacated and set aside, appears on pages 402 to 411, inclusive, of the printed transcript of the record filed herewith, and is reported in 115 Fed. (2), at page 317.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Eighth Circuit, in its last opinion filed in this cause on April 14, 1941, erred:

(1) In holding that the evidence adduced at the trial of the cause in the District Court on the issue of respondent's liability for the injury and death of plaintiff's decedent, John R. Stewart, as for a violation by respondent

of the automatic coupler provision of the Safety Appliance Act, did not make that issue one for the jury.

(2) In holding that in no event may a recovery be had because of the violation of the automatic coupler provision of the Safety Appliance Act for the death of an employee resulting from fatal injuries sustained by him while between two cars attempting to open the knuckle of a coupler of one of them by hand, unless the testimony of an eyewitness to the casualty be adduced affirmatively showing that the deceased employee, before going between the cars to open the knuckle by hand, tried to open it by using the pinlifter at the side of the car.

(3) In holding that the undisputed testimony that the deceased sustained his fatal injuries in a coupling operation, while between two freight cars trying to open the knuckle of one of them by hand, and the undisputed testimony of respondent's foreman that shortly thereafter he coupled those cars together, that to do so he went between the cars and opened this very knuckle by hand, though it is not necessary to go between cars to open a knuckle by hand if the pinlifter is working, and that he tried to use the pinlifter, did not suffice to warrant the jury in finding that said pinlifter was not in efficient working order.

(4) In holding that the evidence adduced in this case did not support the finding by the jury that the injury and death of the deceased employee proximately resulted from the failure of respondent to have and keep its cars equipped with couplers coupling automatically by impact without the necessity of men going between the cars.

SUMMARY OF THE ARGUMENT.

I.

The evidence adduced by the plaintiff at the trial of this cause in the District Court on the issue of respondent's liability for the injury and death of John R. Stewart as for a violation by respondent of the automatic coupler provision of the Safety Appliance Act sufficed to make that issue one for the jury, and the Circuit Court of Appeals erred in holding that the plaintiff was not entitled to have that issue submitted.

(A)

The ruling of the Court of Appeals that in no event may a recovery be had because of the violation of said automatic coupler provision of the Safety Appliance Act for the death of an employee whose fatal injuries were sustained while between two freight cars attempting to open the knuckle of the coupler of one of them by hand, unless the testimony of an eyewitness to the casualty be adduced affirmatively showing that the deceased performed the duty said to have rested upon him to try to open the knuckle by using the pin lifter at the side of the car before going between the cars is not supported by reason or authority.

(1)

While the question so ruled by said Court of Appeals has not, it seems, been expressly decided by this Court, courts that have expressly decided the same have held that where, as in this case, there is evidence that the deceased employee was crushed between cars while trying to open a knuckle by hand in order that a coupling by impact might be made, and evidence tending to show that the only available pin lifter was not in efficient working order, a recovery may be had for the death of such employee, as for a violation of the automatic coupler provision of the Safety Ap-

pliance Act, though the plaintiff be unable to produce the testimony of an eyewitness to the casualty that the deceased tried to use the pin lifter before going between the cars.

Hurley v. Illinois Central Railroad Co., 133 Minn. 101, 157 N. W. 1005;
Yazoo & M. B. Railroad Co. v. Cockerham, 134 Miss. 887, 99 So. 114.

(2)

Said ruling of the Court of Appeals, denying a recovery on the ground that it did not affirmatively appear that the deceased employee performed a duty said to have rested upon him respecting the use or management of the coupling appliance, constitutes a plain disregard of the proviso to Section 53 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 53, Act of Apr. 22, 1908, c. 148, Sec. 3, 35 Stat. 66) providing "that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U. S. 476, l. c. 485, 60 L. Ed. 1110;
Spokane & Inland Empire R. Co. v. Campbell, 241 U. S. 497, l. c. 510, 60 L. Ed. 1125.

(3)

In the absence of evidence to the contrary, a deceased will be presumed to have performed whatever duty may have rested upon him under the circumstances attending his death.

Baltimore & Potomac Railroad Co. v. Landrigan, 191 U. S. 461, l. c. 474, 48 L. Ed. 262;

Miller v. Union Pacific Railroad Co., 290 U. S. 227, l. c. 233, 78 L. Ed. 285;
Travelers Ins. Co. v. McConkey, 127 U. S. 661, l. c. 667, 32 L. Ed. 308;
Worthington v. Elmer, 207 Fed. 306, 309;
New Aetna Portland Cement Co. v. Hatt, 231 Fed. 611, 617.

(B)

The undisputed testimony adduced by the plaintiff that the deceased sustained his fatal injuries in a coupling operation while between two freight cars, trying to open the knuckle of the coupler of one of them by hand, and the undisputed testimony of respondent's foreman that shortly thereafter he coupled those cars together, that to do so he went between them and opened the knuckle by hand, that it is not necessary to go between cars to open a knuckle by hand if the pin lifter is working, and that he tried to use the pin lifter, sufficed to warrant a finding by the jury that said pin lifter was not in efficient working order and that the injury and death of the deceased proximately resulted therefrom.

(1)

The ruling of said Court of Appeals that such undisputed testimony constitutes no substantial evidence that this coupling appliance was inefficient is not in accord with the applicable decisions of this Court holding that, on the question whether a case is one for the jury, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn therefrom; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly

draw different inferences or conclusions from the evidence, the question is one of fact for the jury.

Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193, 58 L. Ed. 906;
New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;
Lumbra v. United States, 290 U. S. 551, 553, 78 L. Ed. 492;
Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419.

(2)

The failure of respondent to produce any evidence as to the condition of the pin lifter, a matter peculiarly within its knowledge, afforded the presumption that such evidence, if produced, would operate unfavorably to respondent and served to leave no room for doubt that the question of respondent's violation of the automatic coupler provision of the Safety Appliance Act was one for the jury.

Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463;
Runkle v. Burnham, 153 U. S. 216, 225, 38 L. Ed. 694;
Graves v. United States, 150 U. S. 120; 37 L. Ed. 121;
Clifton v. United States, 4 How. 242, 244, 11 L. Ed. 957;
Choctaw & M. R. Co. v. Newton, 140 Fed. 225, l. c. 238;
Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 483.

(3)

The test of the observance of the duty placed upon a carrier by the automatic coupler provision of the Safety Appliance Act is the performance of the appliance. Proof of the failure of a coupling appliance to function effi-

ciently at any time, so as to enable a coupling to be effected without the necessity of men going between the ends of the cars, warrants a finding that such appliance was defective or inefficient and not in compliance with the act.

Minneapolis & St. L. R. Co. v. Gottschall, 244 U. S. 66, 61 L. Ed. 995;
Lang v. New York Central R. Co., 255 U. S. 455, 65 L. Ed. 729;
San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110;
Chicago & Rock Island Ry. Co. v. Brown, 229 U. S. 317, 57 L. Ed. 1205;
Philadelphia & Reading Ry. Co. v. Auchenbach, 16 Fed. (2) 550, 552, certiorari denied 273 U. S. 761;
Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798;
Detroit T. & I. R. Co. v. Hahn, 47 Fed. (2) 59.

(4)

The question of the proximate cause of Stewart's injury and death was one for the jury. What is the proximate cause of an injury is ordinarily a question for the jury to determine in view of the accompanying circumstances. A finding of the jury on the question of proximate cause must be allowed to stand unless all reasonable men, exercising unprejudiced judgment, would draw an opposite conclusion from the facts.

Milwaukee & St. Paul Railway Co. v. Kellog, 94 U. S. 469, l. c. 474, 24 L. Ed. 256;
Story Parchment Co. v. Patterson Co., 282 U. S. 555, l. c. 566, 75 L. Ed. 544.

ARGUMENT.

I.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), brought by the personal representative of John R. Stewart, deceased, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the violation by respondent of Section 2 of the Safety Appliance Act (45 U. S. C. A., Sec. 2, 1893, c. 196, Sec. 2, 27 Stat. 531, as amended by Act of March 2, 1903, 32 Stat. 943, c. 976), in failing to have its cars equipped with couplers coupling antomatically by impact without the necessity of men going between the cars.

The pertinent provisions of the Employers' Liability Act are:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Said Section 2 of the Safety Appliance Act provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be

uncoupled without the necessity of men going between the ends of the cars."

Petitioner respectfully submits that the evidence adduced at the trial of the cause in the District Court on the issue of respondent's liability for the injury and death of Stewart as for a violation by respondent of the automatic coupler provision of the Safety Appliance Act fully sufficed to make that issue one for the jury, and that the Circuit Court of Appeals for the Eighth Circuit erred in holding that the plaintiff was not entitled to have that issue submitted.

It is undisputed that respondent and Stewart were both engaged in interstate commerce. At the time of Stewart's fatal injury he was in the employ of respondent as a switchman in its switching yard in East St. Louis, Illinois, and was undertaking to effect a coupling between two freight cars on track 12 in said yard, which extended east and west (R. 26, 27). Seventeen cars had been placed on this track to be coupled together (R. 70, 71, 27). The engine was headed west and seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine (R. 28, 29). Stewart was coupling the cars, working on the north side of the track (R. 29). When it came to coupling to the next car to the east the engineer, in response to Stewart's signals, first backed up, eastwardly, and then stopped. He then saw Stewart go between the cars to be coupled together (R. 44, 45). While Stewart was between the cars, trying to open the knuckle of the coupler of the "east car" with his hands, the cars east of him were struck and moved westwardly, causing the couplers of the cars he was between to come together, crushing his arm between the couplers (R. 29, 50). The foreman, Stogner, who was about ninety feet east of him, heard him "holler," went to him and found that the knuckles of both couplers on those cars were still closed

and that Stewart's arm was caught between couplers (R. 28, 29). On his signal the engineer moved forward, westwardly, releasing Stewart (R. 45, 46). The only pin lifter available to Stewart, for opening one of the knuckles, was that on the north side of the "east car" designed for use in opening the knuckle of the coupler at the west end of that car. The lever of the pin lifter extended to the side of that car at the ~~northeast~~ Northwest corner thereof (R. 37, 39). Stogner was not watching Stewart and did not observe whether he tried to use this pin lifter before going between the cars (R. 43). The engineer, Martin, testified:

> "Q. Did you pay any attenion to whether or not Stewart used the pin lifter before he went in there? A. I did not notice him.
>
> Q. You did not notice? A. I did not notice him.
>
> Q. As an engineer, what do you look out for all the time? A. Look out for signals" (R. 46).

After the casualty Stogner made the coupling between these cars (R. 34). His testimony in that connection will be referred to later in the course of the argument in support of petitioner's contention that such testimony sufficed to show that the pin lifter was not in efficient working order.

(A)

On the issue of respondent's liability for the injury and death of plaintiff's decedent, John R. Stewart, the only questions properly involved on the appeal of this case were whether the evidence adduced sufficed to warrant a finding by the jury that the pinlifter mentioned was not in efficient working order, and whether such inoperative condition thereof, if any, was the proximate cause of the injury and death of the deceased. However, the Circuit Court of Appeals for the Eighth Circuit, in its last opinion filed in the cause (R. 436-444), held that the plaintiff made no case

for the jury for the reason that it was the *duty* of the deceased to use the pinlifter in opening the knuckle on the car so as to prepare it for impact (R. 441); that there is no evidence that he did so (R. 441), and that the burden was upon the plaintiff to show that the deceased *performed such duty* (R. 442).

The ruling of the Court of Appeals, in this portion of its opinion, is not made to depend upon whether there was or was not evidence tending to show that the pinlifter was not in efficient working order as the plaintiff sought to show and which, for reasons to be hereafter noted, petitioner contends plaintiff did show by evidence rightfully engendering that conclusion. In substance, the Court of Appeals, in this portion of its said opinion, held that in no event may a recovery be had for the death of an employee of an interstate carrier by railroad, charged to have been proximately caused by the failure of the carrier to equip its cars with couplers coupling automatically by impact without the necessity of men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, supra, where it appears that the deceased sustained his fatal injuries while between two cars trying to open a knuckle by hand, *unless testimony of an eyewitness to the casualty be adduced affirmatively showing that the deceased performed the duty, said to have rested upon him, of trying to open the knuckle by using the pinlifter before going between the cars to open the knuckle by hand.*

Such ruling, we contend, is plainly unsound. So far as we are advised, the precise question has not been expressly decided by this Honorable Court. It is an important question of federal law, of great public interest, which, we submit, should be authoritatively decided by this Court. The decision of this question by the Court of Appeals in this case, if hereafter followed as a precedent, may well operate to cause a miscarriage of justice in many meritori-

ous death cases arising under the automatic coupler provisions of the Safety Appliance Act.

Said ruling of the Court of Appeals is, we submit, not supported by either reason or authority. Section 2 of the Safety Appliance Act, supra, places no *duty*, as such, upon an employee with respect to the use or management of an automatic coupling appliance. Whether it may be inferred or presumed that the deceased employee tried to open the knuckle by use of the pinlifter before going between the cars to open it by hand, is relevant only because of the bearing it may have upon the charge of the alleged breach of duty on the part of respondent to equip its cars with couplers of statutory requirement, and whether such breach of duty, if any, was the proximate cause of the injury and death of the deceased. So the Court of Appeals correctly held in its first opinion rendered in this case, written by his Honor, Judge Van Valkenburgh (R. 402, 408).

That a recovery may be had for the death of an employee who sustained fatal injuries while between cars trying to open a knuckle of a coupler by hand, where the evidence supports a finding that the coupling appliance did not meet the statutory requirement, though no direct proof be adduced that the deceased tried to use the pinlifter before going between the cars, is a proposition not without support in the adjudicated cases.

In *Hurley v. Illinois Central R. Co.*, 133 Minn. 101, 157 N. W. 1005, the deceased, a switching foreman, sustained fatal injuries while between two cars trying to open the knuckle of a coupler by hand. An examination of the coupling apparatus after the casualty showed that the knuckle in question would not open by use of the pinlifter. Though no witness observed whether Hurley did or did not try to use the pinlifter before going between the cars, the Supreme Court of Minnesota held that the

case was one for the jury. The reasoning of the opinion is unanswerable.

In *Yazoo & M. V. R. Co. v. Cockerham*, 134 Miss. 887, 99 So. 14, the action was for the death of an employee alleged to have been caused by the violation by the defendant carrier of the duty placed upon it by the automatic coupler provision of the Safety Appliance Act, supra. In affirming a judgment for the plaintiff, the Supreme Court of Mississippi said:

> "In many of the cases there was no defect shown in the coupling appliance save the fact that the injured employee attempted to manipulate the lever which for some reason failed to work. In the case at bar *while the testimony is silent as to any attempt to manipulate the lever*, yet the testimony of the plaintiff is to the effect that the coupling appliances would not at all times work by the usual and customary manipulation of the lever. We think the jury were warranted from this testimony in believing this appliance defective *and that it was not necessary before a recovery may be had to prove that the employee attempted to use the lift lever on the defective coupling appliance.*" (Emphasis ours.)

This Court denied certiorari.

> Yazoo & M. V. R. Co., Petitioner, v. Cockerham, Respondent, 265 U. S. 586, 68 L. Ed. 1193.

Said ruling of the Court of Appeals herein constitutes a plain disregard of the proviso to Section 53 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 53, Act of April 22, 1908, c. 148, Sec. 3, 35 Stat. 66), which is as follows:

> "*Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the viola-

tion by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The effect of said ruling of the Court of Appeals is to hold that no recovery may be had without direct proof that the deceased was not guilty of misconduct in failing to properly use or manage the coupling appliance; though such misconduct, if any, could be nothing more than contributory negligence which, by the proviso to Section 53 of the Employers' Liability Act, quoted above, is excluded from consideration. San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U. S. 476, l. c. 485, 60 L. Ed. 1110; Spokane & Inland Empire R. Co. v. Campbell, 241 U. S. 497, l. c. 510, 60 L. Ed. 1125.

And the ruling of the Court of Appeals that, in order to recover, the plaintiff must adduce direct proof that the deceased, for his own protection, tried to use the pinlifter before going between the cars is contrary to the well established principle that, in the absence of evidence to the contrary, a deceased will be presumed to have exercised due care for his own safety, and to have performed whatever duty may have rested upon him under the circumstances attending his death. Baltimore & Potomac Railroad Co. v. Landrigan, 191 U. S. 461, l. c. 474, 48 L. Ed. 262; Miller v. Union Pacific Railroad Co., 290 U. S. 227, l. c. 233, 78 L. Ed. 275; Travelers Ins. Co. v. McConkey, 127 U. S. 661, l. c. 667, 32 L. Ed. 308; Worthington v. Elmer, 207 Fed. 306, 309; New Aetna Portland Cement Co. v. Hatt, 231 Fed. 611, 617.

Such presumption here prevails. There was no evidence to repel it or put it to flight. It is clear that the testimony of Martin, the engineer, constituted no evidence that Stewart did not try to use the pin lifter before going between the cars. In view of the distance that Martin was from Stewart, seven or eight cars, each forty

feet long, and the tender being between them (R. 27, 44), the fact that it was about dusk (R. 27), the fact that the pin lifter is operated by the left hand (R. 33), and the fact that when Stewart went to the opening between these cars he necessarily faced south, with his right side turned toward Martin, who was west of him, the latter had little or no opportunity to observe whether Stewart tried to operate the pin lifter; a matter as to which he was charged with no duty whatsoever. And he did not profess to know what Stewart did in that regard. When asked if he paid any attention to whether or not Stewart used the pin lifter, he said: "I did not notice him" (R. 46). A common meaning of the verb "to notice" is to "pay attention to" (Webster's International Dictionary). And in view of the form of the question propounded to Martin, his answer that he "did not notice him" could not well mean anything other than that he paid no attention to whether Stewart did or did not use the pin lifter; particularly when followed by the statement that what he did all the time was to look out for signals. And if such testimony be susceptible of any other interpretation—which we respectfully dispute—then it was for the jury to say whether it constituted any evidence that Stewart did not use the pin lifter.

We submit that there was in this case no evidence of any probative force or effect tending to show that the deceased did not try to use the pin lifter before going between the cars, and that consequently the presumption that he did so arose as a matter of law. However, the District Court, in a charge that fully covered every feature of the case (R. 333-340), instructed the jury, in substance, that, in the absence of evidence to the contrary, the law presumes that Stewart used the pin lifter before going between the cars (R. 337). In *Baltimore & Potomac R. R. Co. v. Landrigan*, 191 U. S. 461, l. c. 473, 474, this Court approved the action of the lower court in

instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened before going across railroad tracks. This Court, after stating that "there are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to," said:

> "The court did not tell the jury that all those who cross railroad tracks stop, look and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence."

Such was the course pursued in this case, and we submit that, under the circumstances, it was unduly favorable to respondent.

(B)

The Court of Appeals, in its said last opinion herein, next ruled that there was no substantial evidence to warrant a finding by the jury that this pin lifter was not in efficient working order. In this, we submit, the Court of Appeals usurped the function of the jury, and its ruling is in conflict with the decisions of this Court, holding that on the question whether a case is one for the jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may fairly and reasonably be drawn from the evidence; that it is the province of the jury to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on the issue of liability, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, the question is one of fact for the jury. Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720; Myers v. Pittsburgh Coal Co., 233 U. S. 184, l. c. 192, 193, 58 L. Ed. 906; New York Cen-

tral R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892; Lambra v. United States, 290 U. S. 551, 553, 78 L. Ed. 492; Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 524, 527, 69 L. Ed. 419.

Stogner, on direct examination, testified that after Stewart had been removed he coupled together the cars that Stewart was trying to couple when injured, and that to do so he went between the cars and opened by hand the very knuckle that Stewart was trying to open by hand when injured (R. 34); that if the pinlifter is in working condition it is not necessary to go between the cars and open the knuckle by hand (R. 34); that the only thing that would require a man to go in there is that the pinlifter would not work right (R. 40).

On cross-examination Stogner was asked by respondent's counsel *which pinlifter he tried to use,* and he said he tried to use the pinlifter on the north side, the pinlifter on the car east of the opening (R. 36).

We submit that this testimony amply warranted the jury in finding that after the casualty this pinlifter was found not to be in efficient working order. Viewing this testimony in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference that may be fairly and legitimately drawn therefrom, it obviously warrants a finding that when Stogner undertook to couple these cars, almost immediately after the casualty, he first made an unsuccessful attempt to open the knuckle by use of the pinlifter; such an attempt as convinced him, an experienced switchman, that the pinlifter would not function and that to effect a coupling it was necessary for him to go between the cars, as he did, and open the knuckle by hand; the very evil against which the automatic coupler provision of the Safety Appliance Act is directed.

Indeed, Stogner's testimony on direct examination alone sufficed to warrant the inference that he was required to

go between the cars to open the knuckle by hand because he was unable to do so by means of the pinlifting device. Surely no jury would believe that a man in his senses, having freshly in mind the injuries received by Stewart while trying to open the knuckle by hand, would have incurred that very peril by going between the cars and using his hands to open the knuckle unless he had found that the pinlifting device, designed to avoid the danger of going between the cars, was inoperative so as to make such course necessary. And on cross-examination respondent's counsel, recognizing that such was the force of Stogner's testimony on direct examination, clinched the matter by asking Stogner *which pinlifter he tried to use.* And Stogner replied that he tried to use the one on the north side, which was on "the east car on the opening" (R. 36). This testimony fully warranted the triers of the fact in finding that this pinlifter was not in efficient working order. There is no valid basis for the holding of the Court of Appeals that this testimony, as a matter of law, is totally insufficient in probative force to sustain a finding that Stogner made a real, earnest effort to operate the pinlifter before going between the cars. For an experienced switchman to say that he *tried* to use a pinlifter, but went between the cars to open the knuckle by hand—the very thing the pinlifter is designed to avoid—plainly implies that he undertook to operate the pinlifter in the usual way, using such force as was necessary to determine whether it would operate, but was unable to get it to function.

It was the duty of the Court of Appeals, in ruling upon this matter, to view the evidence in the light most favorable to petitioner, and to accord petitioner the benefit of every inference that a jury might with propriety draw from such testimony. Gunning v. Cooley, 281 U. S. 90; Baltimore & Ohio Railroad Co. v. Groeger, 266 U. S. 521, 524, 527. This the Court did not do. The Court suggests that

it does not appear whether Stogner's attempt to open the knuckle was successful, or whether this "try" to use the pin lifter came after the knuckle was opened or before. But when Stogner said he *tried* to use the pin lifter—not that he used it—it could only mean that his attempt was unsuccessful. The word "tried" necessarily implies this. And certainly the only reasonable inference from Stogner's testimony is that his attempt to use the pin lifter was made before he had opened the knuckle by hand. After a knuckle has been opened, no purpose can be served by pulling on the lever of the pin lifter.

In its said former opinion herein the Court of Appeals said:

> "We are asked to declare that, on the record before us, the motions of appellant for a directed verdict and for a verdict in its favor *non obstante veredicto* should have been sustained; but in view of that record, we cannot say that the inference might not reasonably have been drawn by the triers of the fact that there was probable cause to believe that the injury suffered was caused by the breach of duty charged" (R. 409).

Such ruling, we submit, was entirely sound.

It is not without significance that respondent, at the trial in the District Court, stood mute and offered not one word of testimony as to the condition in which it found this coupling appliance after the casualty. Respondent had this coupling appliance in its possession and had every opportunity to inspect and test the pin lifter to see whether it was functioning efficiently. It is fair to assume that respondent did make an inspection and test thereof, for it was respondent's duty to investigate the cause of the casualty. But respondent did not see fit to offer a word of testimony touching that matter. It is a thoroughly established rule of law that the failure of a party to produce evidence of matters peculiarly within his knowledge affords

a presumption that such evidence, if produced, would operate unfavorably to him. Kirby v. Tallmadge, 160 U. S. 379, 40 L. Ed. 463; Runkle v. Burnham, 153 U. S. 216, 225, 38 L. Ed. 694; Graves v. United States, 150 U. S. 120, 37 L. Ed. 121; Clifton v. United States, 4 How. 242, 244, 11 L. Ed. 957; Choctaw & M. R. Co. v. Newton, 140 Fed. 225, l. c. 238; Gulf C. & S. F. Ry. Co. v. Ellis, 54 Fed. 481, 483. Here the failure of respondent to produce any evidence as to the condition of this coupling appliance, a matter peculiarly within its knowledge, served to leave no possible room for doubt that the question of respondent's violation of the Safety Appliance Act was one for the jury.

It is well settled that it is not necessary to show a specific defect in a coupling appliance. Stogner's testimony shows that this appliance would not function efficiently. The test of the observance of the duty placed upon a carrier by the automatic coupler provisions of the Safety Appliance Act is the performance of the appliance. The failure of a coupling appliance to function efficiently at any time, so as to enable a coupling to be effected without the necessity of men going between the ends of the cars, supports a charge that the act was violated. Minneapolis & St. P. R. Co. v. Gottschall, 244 U. S. 66, 61 L. Ed. 995; Lang v. New York Central R. Co., 255 U. S. 455, 65 L. Ed. 729; Detroit T. & I. R. Co. v. Hahn, 47 Fed. (2) 59, certiorari denied 283 U. S. 842; Philadelphia & Reading Ry. Co. v. Auchenbach, 16 Fed. (2) 550, 552, certiorari denied 273 U. S. 761; Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798.

And under the evidence in this case, tending to show that it was found after the casualty that the pin lifter did not operate efficiently, making it necessary to open the knuckle by hand, and the evidence as to the circumstances under which Stewart met his death, with the inferences legitimately deducible therefrom, the jury was warranted in finding that Stewart went between the cars to open

knuckle by hand because it could not be opened by means of the pin lifter, and that such inoperative condition of the pin lifter was consequently the proximate cause of his injury and death. What is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it. It is only where minds of reasonable men could draw but one possible conclusion from the evidence that the question of proximate cause becomes one of law for the Court. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, l. c. 474, 24 L. Ed. 256; Story, Parchment v. Patterson Co., 282 U. S. 555, l. c. 566, 75 L. Ed. 544.

Petitioner therefore prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit rendered herein on the 14th day of April, 1941, be reversed.

Respectfully submitted,

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